No. 88-1321

Supreme Court, U.S.
FILED
FEB 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION,

Petitioner,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STEVEN A. SMITH
(Counsel of Record)
JAMES H. SCHINK

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

Of Counsel:

STEVEN K. COVEY
NAVISTAR INTERNATIONAL
TRANSPORTATION CORPORATION
401 N. Michigan—24th Floor
Chicago, Illinois 60611

DATED: February 7, 1989

Pandick Midwest, Inc., Chicago • (312) 733-6000

QUESTIONS PRESENTED

The Sixth Circuit's decision in this Clean Air Act enforcement case raises two fundamental issues concerning the standards for liability in noncompliance penalty proceedings:

1. Should U.S. EPA's interpretation of an implementation plan provision promulgated by a State pursuant to the Clean Air Act be accorded considerable deference in the context of an enforcement proceeding?

2. Can U.S. EPA properly determine liability in a Clean Air Act administrative hearing after excluding evidence that it is technically and economically infeasible for an air contaminant source to comply with implementation plan requirements?

The first of these issues presents an important question of law regarding the scope of this Court's *Cardoza-Fonseca* and *Texas Gas* decisions.* The second raises a direct conflict in the circuits that the decision below makes unmistakable.

---

* *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); and *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263 (1960).

PARTIES TO THE PROCEEDINGS

Petitioner Navistar International Transportation Corporation was petitioner below on the issues presented for review. Respondent United States Environmental Protection Agency was respondent below on the issues presented for review.

Navistar International Transportation Corporation's parent company is Navistar International Corporation. Navistar International Transportation Corporation has no non-wholly owned subsidiaries or affiliates.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties to the Proceedings	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
I. The Court of Appeals Improperly Accorded Considerable Deference to U.S. EPA's Interpretation of the Ohio Administrative Regulation.	6
II. The Sixth Circuit's Considerable Deference Standard Runs in the Teeth of Prior Supreme Court Precedent	8
III. The Sixth Circuit's Decision is Erroneous Because U.S. EPA's Interpretation of the Ohio Administrative Regulation is Inconsistent with the Terms of that Regulation	10
IV. The Agency Improperly Excluded Evidence of Technological and Economic Infeasibility	12
Conclusion	16

Appendix

App. A: Sixth Circuit Opinion, September 23, 1988.

App. B: Sixth Circuit Judgment, September 23, 1988.

App. C: Sixth Circuit Order denying petition for rehearing and suggestion for rehearing *en banc,* November 10, 1988.

App. D: U.S. EPA Final Order, March 24, 1987.

App. E: U.S. EPA Initial Decision, December 19, 1986.

App. F: U.S. EPA Order on Motion in Limine, December 13, 1985.

TABLE OF AUTHORITIES

Cases	PAGE
Adams House Health Care v. Heckler, 817 F.2d 587 (9th Cir. 1987)	9
Bethlehem Steel Corp. v. EPA, 638 F.2d 994 (7th Cir. 1980)	13
Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028 (7th Cir. 1984)	7
Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)	7
Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973)	13
Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984)	8
Cincinnati Gas & Elec. Co. v. Federal Energy Regulatory Comm'n, 724 F.2d 550 (6th Cir. 1984)	9
Cleveland Electric Illuminating Co. v. EPA, 572 F.2d 1150 (6th Cir. 1978), *cert. denied*, 439 U.S. 910 (1978)	15
Dirks v. Securities and Exch. Comm'n, 463 U.S. 646 (1983)	8
Dougherty v. Torrence, 442 N.E. 2d 1295 (1982)	10
Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983)	15
Florida Power & Light Co. v. Costle, 650 F.2d 579 (5th Cir. 1981)	8
Hardin v. Kentucky Utils. Co., 390 U.S. 1 (1959)	10
Immigration & Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987)	*passim*
Indiana & Michigan Electric Co. v. EPA, 509 F.2d 839 (7th Cir. 1975)	12

Cases	PAGE
Industrial Union Dep't AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980)	8
International Union, UAW v. Brock, 816 F.2d 761 (D.C. Cir. 1987)	9
Lewis v. Buena Vista Mutual Ins. Assoc., 183 N.W. 2d 198 (Iowa 1971)	15
National Labor Relations Bd. v. Yeshiva Univ., 444 U.S. 672 (1980)	8
National Steel Corp., Great Lakes Steel Div. v. Gorsuch, 700 F.2d 314 (6th Cir. 1983)	15
Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Comm'n, 462 U.S. 669 (1983)	8
Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977)	9
Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977)	7
Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263 (1960)	*passim*
Udall v. Tallman, 380 U.S. 1 (1965)	6
Union Electric Co. v. EPA, 427 U.S. 246 (1976)	14
Union of Concerned Scientists v. United States Nuclear Regulatory Comm'n, 824 F.2d 108 (D.C. Cir. 1987)	9
United States v. Ford Motor Co., 814 F.2d 1099 (6th Cir. 1987)	14
United States v. Menasche, 348 U.S. 528 (1955)	4
United States v. Interlake, Inc., 429 F.Supp 193 (N.D. Ill. 1977)	7

Cases PAGE

United States v. Riverside Laboratories, Inc., 678 F. Supp. 1352 (N.D. Ill. 1988) 7

United States v. Town of Hempstead, 610 F.2d 1025 (2nd Cir. 1979) 13

United States v. West Penn Power Co., 460 F. Supp. 1305 (W.D. Pa. 1978) 13

University of Cincinnati v. Heckler, 733 F.2d 1171 (6th Cir. 1984) 7

Statutes

O.A.C. § 3745-21 ..... *passim*

28 U.S.C. § 1254(1) 2

42 U.S.C. § 7420 ..... *passim*

42 U.S.C. § 7410 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION,

Petitioner,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Navistar International Transportation Corporation respectfully requests that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the Sixth Circuit entered on September 23, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 858 F.2d 282 and appears as App. A in the Appendix. U.S. EPA's unreported final order affirming the administrative law judge's initial decision on liability appears as App. D. The U.S. EPA

administrative law judge's unreported initial decision on liability appears as App. E. The U.S. EPA administrative law judge's unreported ruling excluding evidence of technical and economic infeasibility appears as App. F.

JURISDICTION

The judgment of the Court of Appeals (App. B) was entered on September 23, 1988. A timely petition for rehearing and suggestion that rehearing be *en banc,* was denied on November 10, 1988. (App. C) Jurisdiction of this Court is premised upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 120 of the Clean Air Act, 42 U.S.C. § 7420, provides in pertinent part:

> . . . the Administrator shall assess and collect a noncompliance penalty against every person who owns or operates (i) a major stationary source . . . which is not in compliance with any emission limitation. . . .

Rule 3745-21-09(U)(1)(a)(iii) of the Ohio Administrative Code, provides in pertinent part:

> Except where exempted under paragraph (U)(2) of this rule, no owner or operator of a miscellaneous metal part or product coating line may cause, allow or permit the discharge into the ambient air of any volatile organic compounds . . . exceed[ing] . . . 3.5 pounds of VOC per gallon of coating. . . .

STATEMENT OF THE CASE

This petition seeks review of the Sixth Circuit's decision: 1) that considerable deference should be paid to U.S. EPA's interpretation of an Ohio State Implementation Plan provision upon which Navistar's liability was founded, and 2) that U.S. EPA's determination of Navistar's liability was proper despite the exclusion of evidence that it was technically and economically infeasible for Navistar to comply with the Ohio State Implementation Plan provision at issue.

After an administrative hearing on March 4-5, 1986, Navistar's emissions from its paint coating operations at its Springfield, Ohio truck assembly plant were found to be in violation of Section 120 of the Clean Air Act. 42 U.S.C. § 7420. App. E-17. The particular regulation at issue, Ohio Administrative Code Rule 3745-21-09(U), was contained within the Ohio State Implementation Plan. The determination of violation was appealed to the administrator of U.S. EPA, whose chief judicial officer entered a final order affirming the liability determination on March 24, 1987. App. D-7. The appeal to the Sixth Circuit followed.

On appeal to the Sixth Circuit, Navistar argued that the administrator of U.S. EPA erred in his interpretation of the Ohio administrative regulation at issue. During the administrative hearing, Navistar offered evidence that the plain meaning of the regulation excluded by definition two of Navistar's coating operations at its truck assembly plant. This, because those two operations did not employ bake ovens in the coating process.

The administrator adopted the ALJ's determination that, with respect to the need for bake ovens, the regulation should be interpreted in the disjunctive as opposed to the conjunctive. Such an interpretation rendered the presence of bake ovens unnecessary to the determination of whether any given coating

operation was included within the coating line definition appearing in the regulation. The administrator then compounded his erroneous interpretation by adopting the ALJ's determination that the definition of coating line could be read as "a series of one." App. D-2.

Navistar also urged on appeal to the Sixth Circuit that the administrator, having adopted the ALJ's interpretation of the Ohio administrative regulation, erred again in finding that the refinishing exemption, Ohio Administrative Code Rule 3745-21-09(U)(2)(c), did not apply to three of Navistar's coating operations. Relying on this Court's decision in *United States v. Menasche,* 348 U.S. 528 (1955), Navistar argued that effect must be given to *every* word and clause of a statute or regulation. including the refinishing exemption. Navistar further argued on appeal that its non-metallic painting operations were not regulated under Ohio Administrative Code Rule 3745-21-09(U) which sets limits on emissions of volatile organic compounds from the coating of miscellaneous metal parts.

Finally, Navistar urged on appeal that, irrespective of whether U.S. EPA's interpretations were plainly erroneous or inconsistent with the terms of the regulation, the administrator's determination on these purely legal questions should not be accorded considerable deference. Relying on *INS v. Cardoza-Fonseca,* 480 U.S. 421 (1987), Navistar argued that courts need not defer to agency opinions on pure questions of interpretation.

On September 23, 1988, the Sixth Circuit affirmed the administrator's final order holding Navistar liable for Clean Air Act violations. The Sixth Circuit held that U.S. EPA's interpretation of the Ohio administrative regulation should be accorded considerable deference. 858 F.2d at 286, App. A-7, 8. Accordingly, the Sixth Circuit reviewed the administrator's interpretation with an eye to whether it was plainly erroneous

or inconsistent with the terms of the Ohio administrative regulation. Finding that U.S. EPA's constructions of the refinishing exemption, coating line definition and miscellaneous metal part provision were neither erroneous nor inconsistent, the Sixth Circuit affirmed the administrator's opinion that the Ohio administrative regulation applied to Navistar's refinishing and non-metallic part spraying operations as well as to the two coating operations which did not employ bake ovens. 858 F.2d at 286-88, App. A-9 to 12.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's opinion affirmed the decision of the administrator of U.S. EPA holding Navistar liable for violating Section 120 of the Clean Air Act. 42 U.S.C. § 7420. The Sixth Circuit's opinion reflects four fundamental errors.

First, while the administrator's decision states that the regulations under which Navistar was found liable were formulated and promulgated by the Ohio Environmental Protection Agency ("Ohio EPA"), not U.S. EPA, the Sixth Circuit applied a "considerable deference" standard of review assuming that U.S. EPA's interpretation deferred to was of its own administrative regulation. That conclusion rewrites the administrator's decision.

Second, the Sixth Circuit mistakenly interpreted several Supreme Court decisions which hold that where a pure question of law is addressed, the court need not defer to agency opinion. The Court of Appeals also disregarded other Supreme Court and Sixth Circuit decisions to the same effect, which hold that where an agency's interpretation does not emanate from matters within its special competence, the agency's interpretation need not be deferred to. The Sixth Circuit's deference to U.S. EPA's interpretation of the Ohio administrative regulation is thus in direct conflict with, and *sub silentio* overrules, previously

decided cases which afford *de novo* review of certain agency interpretations.

Third, the Sixth Circuit concluded that the administrator's interpretation of the Ohio administrative regulation was not plainly erroneous or inconsistent with the terms of that regulation. The plain meaning of that regulation, however, runs in the teeth of U.S. EPA's interpretation.

Fourth, the Sixth Circuit affirmed the administrative law judge's exclusion of evidence that it was technically and economically infeasible for Navistar to comply with the Ohio State Implementation Plan emission limitation. This, despite the fact that evidence of technical and economic infeasibility should figure heavily in the determination of whether an air contaminant source is liable for exceeding emission limitations.

I. THE COURT OF APPEALS IMPROPERLY ACCORDED CONSIDERABLE DEFERENCE TO U.S. EPA'S INTERPRETATION OF THE OHIO ADMINISTRATIVE REGULATION

The Court of Appeals deferred to the administrator's opinion of the regulation in issue chiefly as a result of the panel's view that U.S. EPA was interpreting its own administrative regulation. The Sixth Circuit determined that the standard of review "in cases involving conflicting interpretations of an administrative regulation is to give considerable deference to the administrative agency's interpretation." (citation omitted) 858 F.2d at 286, App. A-7.

In reaching this conclusion, the Court of Appeals relied on two inapt Supreme Court decisions. 858 F.2d at 286, App. A-8. In the case of *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965), this Court accorded deference to the Interior Secretary's interpretation of his own public land order.[1] In the second case

[1] The Supreme Court later reiterated that the deference standard found in *Udall v. Tallman,* 380 U.S. 1 (1965), should be delimited to

(Footnote continued on following page.)

cited by the Sixth Circuit, *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945), the Supreme Court paid deference to the Price Administrator's construction of his own maximum price regulation.

In both cases, this Court deferred to an agency's opinion of administrative regulations which the agency had promulgated.[2] The Sixth Circuit's reliance on these cases was improper since Ohio EPA, not U.S. EPA, formulated and promulgated the administrative regulation at issue, *viz.*, Ohio Administrative Code Rule 3745-21-09(U). The manner in which Ohio EPA formulated and promulgated its Rule 3745-21-09(U) is explained by the administrator of U.S. EPA in the final order from which Navistar appealed. App. D-3. In brief, the 1970 Amendments to the Clean Air Act require each state to develop a state implementation plan for the "implementation, maintenance and enforcement" of national ambient air quality standards. 42 U.S.C. § 7410.

Accordingly, Ohio EPA promulgated the instant regulation during its formulation of the Ohio State Implementation Plan for ozone. Air emission regulations promulgated in this fashion have uniformly been characterized as state law, not as U.S. EPA legislative rules.[3] As such, no deference should have

---

(Footnote continued from preceding page.)

instances in which an agency interprets its own regulation. *Piper v. Chris-Craft Industries*, 430 U.S. 36, 41 n.27 (1977).

[2] The Court of Appeals also relied on a Sixth Circuit decision, *University of Cincinnati v. Heckler*, 733 F.2d 1171 (6th Cir. 1988), for the proposition that U.S. EPA's interpretation should be accorded considerable deference. This decision, however, also involved an agency's interpretation of its own regulation, and was thus inapposite to the Sixth Circuit's determination to defer to the administrator's opinion of the Ohio administrative regulation.

[3] *See, e.g., Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1035-36 (7th Cir. 1984); *United States v. Riverside Laboratories, Inc.*, 678 F.Supp 1352, 1355-57 (N.D. Ill. 1988); *United States v. Interlake, Inc.*, 429 F.Supp 193, 197 (N.D. Ill. 1977).

been accorded U.S. EPA's interpretation of Rule 3745-21-09(U). *See Florida Power & Light Co. v. Costle,* 650 F.2d 579, 588 (5th Cir. 1981). Rather, the administrator's opinion of the Ohio administrative rule should have been subject to *de novo* review, as further explained below.

II. THE SIXTH CIRCUIT'S CONSIDERABLE DEFERENCE STANDARD RUNS IN THE TEETH OF PRIOR SUPREME COURT PRECEDENT

The Sixth Circuit mistakenly interpreted several Supreme Court decisions which hold that where a pure question of law is addressed, the court need not defer to agency opinion. 858 F.2d at 286, App. A-7. In *INS v. Cardoza-Fonseca,* 480 U.S. 421, 440 (1987), this Court held that where purely legal questions are at issue, the court has broad authority to conduct an independent and *de novo* review of agency decisions.[4] In such instances, the court is to use traditional tools of construction to ascertain intent. In the instant matter, the Sixth Circuit addressed just such a legal question, and should have undertaken a *de novo* review of the administrator's opinion of the Ohio administrative rule.

Instead, the Sixth Circuit attempted to limit the *Cardoza-Fonseca* decision to its facts, on the basis that the *Cardoza-Fonseca* Court undertook a *de novo* review of an agency's interpretation of statutory law, rather than an administrative regulation. 858 F.2d at 286, App. A-7. This argument proves too much, however, since the *Cardoza-Fonseca* Court unequivocally stated that the rule of deference to agency interpretations (set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984)) is applicable only in

---

[4] *See also Dirks v. SEC,* 463 U.S. 646, 655-64 (1983) (Supreme Court conducted independent and *de novo* review of legal question, substituting its judgment for that of agency, whose interpretations were accorded no deference); *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. 669, 673-84 (1983) (same); *NLRB v. Yeshiva University,* 444 U.S. 672, 678-80 (1980) (same); *AFL-CIO v. American Petroleum Institute,* 448 U.S. 607, 695 n.9 (1980) (same).

situations where "the agency is required to apply [legal] standards to a particular set of facts." 480 U.S. at 439. *See Union of Concerned Scientists v. United States Nuclear Regulatory Comm'n,* 824 F.2d 108, 112 (D.C. Cir. 1987); and *International Union, UAW v. Brock,* 816 F.2d 761, 766 (D.C. Cir. 1987). Due to the breadth of the *Cardoza-Fonseca* Court's holding, this would obtain irrespective of whether the agency interprets statutory law or administrative regulation. 480 U.S. at 440.[5] *See also Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 256-59 (1976).

The Sixth Circuit's deference to the administrator's opinion also cannot be reconciled with this Court's decision in *Texas Gas Transmission Corp. v. Shell Oil Co.,* 363 U.S. 263 (1960). In *Texas Gas,* this Court upheld a *de novo* review standard where "the Commission professed to dispose of the case solely upon its view of the result called for by the application of canons of construction employed by the courts, and did not in any wise rely on matters within its special competence." 363 U.S. at 270. A *de novo* review standard was also recently employed by the Sixth Circuit. *Cincinnati Gas & Elec. Co. v. FERC,* 724 F.2d 550, 554 (6th Cir. 1984). In *Cincinnati Gas,* the Sixth Circuit noted that " '[q]uestions of law, unlike questions of fact, are freely reviewable by the court.' " 724 F.2d at 554. This was found in *Cincinnati Gas* to be particularly appropriate where no factual or technical expertise is implicated. 724 F.2d at 555.

Similarly, in the instant matter, the construction of the refinishing exemption, coating line definition and miscellaneous metal part provision of Ohio Administrative Code Rule 3745-21-09(U) did not implicate the administrator's special com-

[5] *See also Adams House Health Care v. Heckler,* 817 F.2d 587, 589-91 (9th Cir. 1987) (holding that deference to any agency's interpretation is unwarranted where the agency applies law to fact or the construction requires consideration of broad concerns beyond the agency's expertise).

petence, and the Sixth Circuit should not have deferred to the administrator's opinion. The same argument about the greater relative expertise of courts in matters of construction has frequently succeeded. *See, e.g., Hardin v. Kentucky Utilities Co.,* 390 U.S. 1, 14 (1968). In brief, the Sixth Circuit should have undertaken a *de novo* review of the administrator's opinion of the Ohio administrative rule. The credulous deference paid instead by the Court of Appeals to the administrator's interpretation presents an important question of law regarding the scope of this Court's *Cardoza-Fonseca* and *Texas Gas* decisions.

III. THE SIXTH CIRCUIT'S DECISION IS ERRONEOUS BECAUSE U.S. EPA'S INTERPRETATION OF THE OHIO ADMINISTRATIVE REGULATION IS INCONSISTENT WITH THE TERMS OF THAT REGULATION

The Sixth Circuit held that two of Navistar's coating operations were regulated despite the absence of bake ovens in the coating process. 858 F.2d at 288, App. A-10. This finding is inconsistent with the terms of Ohio Administrative Code Rule 3745-21-01(D)(8), which makes clear that paint booths must have bake ovens to be regulated. It is a basic tenet of statutory construction that, whenever possible, effect must be given to *every* word and clause of a statute or regulation. *United States v. Menasche,* 348 U.S. 528, 538-39 (1955). "When the wording of a statute is clear and unambiguous on its face, judicial interpretation is not required; rather, the court must give effect to the words used." *Dougherty v. Torrence,* 2 Ohio St. 3d 69, 70, 442 N.E.2d 1295, 1296 (1982).

Here, the Ohio administrative regulation which U.S. EPA seeks to enforce against Navistar applies only to miscellaneous metal part or product coating lines. Ohio Administrative Code Rule 3745-21-09(U)(1)(a)(iii). The coating line definition specifies that a coating line consists of a series comprised of one

or more coating applicators, one or more flash-off areas, *and* one or more ovens. Ohio Administrative Code Rule 3745-21-01(D)(8). The coating line definition is thus unambiguous, and its plain meaning, requiring the presence of bake ovens, should be given effect.

The administrator's interpretation of the refinishing exemption and miscellaneous metal part provision of the Ohio administrative regulation is also plainly erroneous and inconsistent with the terms of that regulation. Nevertheless, the Sixth Circuit deferred to the administrator's unsupported opinion that the refinishing exemption does not apply to Navistar's coating operations and that Navistar's coating of non-metallic parts is regulated. In this regard, Ohio EPA easily could have defined "refinishing" in a more limited fashion, but elected to broadly define this term in its promulgation of the administrative regulation. The administrator's finding tnat the refinishing exemption applies only to body shops is thus plainly erroneous.

Further, certain parts coated on several of Navistar's lines are made only of non-metallic materials and have no metal formed on them. Emissions from these non-metallic painting operations are clearly not regulated under the Ohio administrative regulation, which plainly pertains solely to emissions from the coating of miscellaneous metal parts. The administrator's finding that non-metallic coating operations are regulated is again inconsistent with the terms of the Ohio administrative regulation.

In sum, the Sixth Circuit's deference to the administrator's interpretation of the Ohio administrative regulation is incompatible with previous decisions holding that agency opinions should not be deferred to on purely legal questions which do not implicate the agency's factual or technical expertise. The deference extended to the administrator's opinion effectively affirmed an interpretation which is plainly erroneous and inconsistent with the terms of the Ohio administrative regulation.

IV. THE AGENCY IMPROPERLY EXCLUDED EVIDENCE OF TECHNOLOGICAL AND ECONOMIC INFEASIBILITY

The Sixth Circuit affirmed the Agency's liability determination made after the close of an administrative hearing during which evidence of technical and economic infeasibility of compliance with the Ohio State Implementation Plan ("Ohio SIP") was improperly excluded. Such evidence is relevant to the matters at issue in a Clean Air Act Section 120 enforcement action and should have been admitted.

On the issue of admissibility of evidence of infeasibility, the Sixth Circuit's decision sharpens a clear conflict in the circuits. The Seventh Circuit held in *Indiana & Michigan Electric Company v. EPA,* 509 F.2d 839 (7th Cir. 1975), that U.S. EPA is not required to consider technological feasibility and economic reasonableness prior to approval of a state implementation plan only because arguments concerning technological feasibility and economic unreasonableness are allowed to be raised as to a specific source in the course of an enforcement proceeding:

> In our view, these contentions serve to underscore the appropriateness of considering technological and economic factors in the course of enforcement proceedings rather than in connection with approval of a state plan under § 110. Many of the very arguments presented by petitioners demonstrate that the requirements of a state's implementation plan might well be achievable as applied to most stationary facilities which emit the pollutants covered under the plan, and yet be technologically impossible to achieve as applied to a particular source. . . [Our holding] does not preclude petitioners from presenting technological feasibility and economic impact arguments in the course of enforcement proceedings.

Id. at 844-45. The Seventh Circuit's ruling reflects the principle that due process safeguards require that individual facilities be

allowed at some juncture to demonstrate the technological infeasibility and/or economic unreasonableness of their specific compliance and that a particular legal requirement would be arbitrary and capricious, and therefore invalid, if applied to facilities for which compliance could not be achieved for these reasons.[6]

The decision in *United States v. West Penn Power Co.*, 460 F. Supp. 1305, 1307-12 (W.D. Pa. 1978) accords with the Seventh Circuit's ruling that technological infeasibility and economic unreasonableness bear heavily on liability determinations in Clean Air Act enforcement actions. In *West Penn Power Co.*, the court exhaustively canvassed several pollution control alternatives, rejecting two out of hand as unduly expensive and technically infeasible. *Id.* at 1308. The court ultimately issued an injunction requiring the defendant to install a scrubber, but did so only after painstakingly assessing proofs directed to the technical and economic feasibility of that proposed scrubber. *Id.* at 1308-12. Similarly, the Second Circuit has stated that proof of relevant circumstances, including technical and economic infeasibility, should be considered in making liability determinations in Clean Air Act enforcement proceedings. *United States v. Town of Hempstead*, 610 F.2d 1025, 1027 & n.3 (2nd Cir. 1979) (dictum).

The Seventh Circuit reaffirmed that technological infeasibility and economic unreasonableness are relevant in an enforcement proceeding in *Bethlehem Steel Corp. v. EPA*, 638 F.2d 994 (7th Cir. 1980):

> As stated previously, it is now becoming established that ... the EPA is not free to disapprove a state SIP on the

---

[6] *See also Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 169 (6th Cir. 1973) (EPA's argument that technological infeasibility, high cost-benefit, and resource unavailability are irrelevant found "devoid of merit.")

> grounds that its requirements are not technologically feasible. . . . However, because these procedures may result in the state's requiring technological innovations that are infeasible or "border on the impossible," . . . these cases recognize that the source may raise its infeasibility defense in the course of enforcement proceedings.

Id. at 1005.

These authorities reflect the basic constitutional tenet that application of a regulation (whether adopted through the legislative or administrative process) is permissible only if reasonable and not arbitrary or capricious as specifically applied. In this proceeding, Navistar contends that the Ohio Rule is unreasonable as specifically applied to Navistar because its compliance with the rule is technologically infeasible and economically unreasonable. Because compliance with the Ohio Rule would be infeasible, its provisions cannot be applied to Navistar.

The Sixth Circuit's decision affirming the exclusion of evidence of infeasibility relied heavily on the decision in *United States v. Ford Motor Co.*, 814 F.2d 1099, 1103 (6th Cir. 1987). That case is distinguishable on its facts. Unlike the defendant in *Ford Motor Co.*, Navistar does not desire to invalidate or nullify a SIP provision; rather, Navistar simply suggests that the plain meaning of an unambiguous SIP provision be accorded its proper effect.

Also, unlike the *Ford Motor Co.* defendant, Navistar had no meaningful opportunity to raise its claims of technological and economic infeasibility. In accord with this Court's ruling in *Union Electric Co. v. EPA*, 427 U.S. 246, 266 (1976), U.S. EPA, in its review of the proposed Ohio SIP, was proscribed from considering claims of technical and economic infeasibility. Thus, Navistar could not have brought its claims of technological and economic infeasibility to EPA or to a federal

court of appeals within 60 days of EPA's approval of the Ohio SIP. *See also National Steel Corp. Great Lakes Steel Div. v. Gorsuch,* 700 F.2d 314, 324 (6th Cir. 1983) (neither EPA nor a federal court may reject a SIP provision on grounds of economic or technological infeasibility); *Cleveland Electric Illuminating Co. v. EPA,* 572 F.2d 1150, 1164 (6th Cir.), *cert. denied,* 439 U.S. 910 (1978) (same).

The Agency's exclusion of evidence of technological and economic infeasibility derived, in part, from the opinion in *Duquesne Light Company v. EPA,* 698 F.2d 456, 463 (D.C. Cir. 1983). App. F-2. That decision is inapposite. First, the *Duquesne* court was concerned only with a general review of the Agency's procedural regulations promulgated pursuant to Section 120 and did not directly address the constitutional necessity of allowing a respondent to show specific inapplicability of a particular legal requirement such as the Ohio Rule. Second, with respect to the issue of technological infeasibility, the court limited itself solely to an analysis of the Agency's exemption requirements and did not consider whether that issue is relevant to a determination of compliance with a particular legal requirement such as the Ohio SIP. Finally, the court in *Duquesne* did not even consider the issue of economic unreasonableness, an issue that is without doubt relevant to this proceeding.

Because Navistar had no meaningful opportunity to present its claims of technical and economic infeasibility during the Ohio SIP adoption process, constitutional due process safeguards require that such claims be considered during the liability phase of this proceeding. The Agency's exclusion of evidence on these issues improperly "chok[ed] off an entire claim or defense," *Lewis v. Buena Vista Mutual Ins. Assoc.,* 183 N.W.2d 198, 200-01 (Iowa 1971), and rendered arbitrary and capricious the application of the Ohio Rule to Navistar. The Sixth Circuit's decision affirming this exclusion should therefore be reviewed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

STEVEN A. SMITH
(Counsel of Record)
JAMES H. SCHINK

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

Of Counsel:

STEVEN K. COVEY
NAVISTAR INTERNATIONAL
TRANSPORTATION CORPORATION
401 N. Michigan—24th Floor
Chicago, Illinois 60611

DATED: February 7, 1989

APPENDIX A

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 87-3474

United States Court of Appeals

FOR THE SIXTH CIRCUIT

NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION, *Petitioner,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

On Petition to Review an Order from the United States Environmental Protection Agency.

Decided and Filed September 23, 1988

Before: KENNEDY and RYAN, Circuit Judges; and PECK, Senior Circuit Judge.

RYAN, Circuit Judge. Petitioner, Navistar International Transportation Corporation (Navistar) (formerly International Harvester), seeks review of the decision of the administrator of the Environmental Protection Agency finding petitioner liable for violations of the Clean Air Act. We affirm.

I.

Navistar appeals the decision of the administrator (EPA) finding Navistar liable for violating § 120 of the Clean Air Act, 42 U.S.C. § 7420. Navistar operates a truck assembly facility in Springfield, Ohio. Within the assembly plant are located ten "painting booths" which are used to paint the various parts which are manufactured or assembled at the plant. Following the painting, the parts are moved by conveyor into drying and baking ovens, with the exception of three painting booths which do not employ ovens. Six of the booths paint only metallic parts while four paint both metallic and other parts. Three of the booths are used to touch up paint which has been scratched or to paint areas that have been missed.

Pursuant to the Clean Air Act, the EPA has set National Ambient Air Quality Standards (NAAQS). Each state is responsible for drafting a State Implementation Plan (SIP) to provide for implementation and enforcement of standards such as NAAQS. 42 U.S.C. § 7410(a)(1). The SIPs must be approved by the EPA and meet statutory requirements. A SIP must include "emission limitations, schedules, and time tables for compliance for such limitations, and such other measures as may be necessary to insure attainment." 42 U.S.C. § 7410(a)(2)(B). Emission limitations pursuant to a SIP are enforceable as federal law. 42 U.S.C. § 7410(d). Violators of the emission limitations can be penalized pursuant to 42 U.S.C. § 7420 which allows a penalty equal to the amount of economic benefit gained by delaying compliance with a SIP. "A brief but reasonably specific notice of noncompliance" must be sent to one not in compliance with a SIP. 42 U.S.C. § 7420(b)(3).

The particular regulation at issue here is contained within the Ohio SIP. Section 3745-21-09(U) of the Ohio Administrative Code provides, in pertinent part:

> (U) Surface coating of miscellaneous metal parts and products.

(1) Except where exempted under paragraph (U)(2) of this rule, no owner or operator of a miscellaneous metal part or product coating line may cause, allow or permit the dischare into the ambient air of any volatile organic compounds from such coating line after the date specified in paragraph (C)(28) for rule 3745-21-04 of the Administrative Code unless the requirements of either paragraph (U)(1)(a) or (U)(1)(b) of this rule are satisfied.

(a) The volatile organic compound content of each coating employed in the miscellaneous metal part or product coating line, as determined under paragraph (B) of rule 3745-21-10 of the Administrative Code, does not exceed the least stringent of any of the following limitations which are applicable:

. . .

(ii) 4.0 pounds per gallon of coating, excluding water, for a zinc rich primer coating;

(iii) 3.5 pounds per gallon of coating, excluding water, for an extreme performance coating;

On September 24, 1984, the EPA notified Navistar that it was not in compliance with the Ohio SIP, as its painting lines emitted pollutants beyond the emission limitations. The notice of noncompliance included a transmittal letter which stated the following were included in the notice package: (1) the notice of noncompliance, (2) a technical support document and an instruction manual, and (3) relevant code of federal regulations sections. The package, however, did not contain the technical support document nor the instruction manual. The notice informed Navistar it could either calculate the penalty owed and a payment schedule, or file a petition for reconsideration.

After three extensions, Navistar filed its petition for reconsideration on March 4, 1985. Navistar raised four issues: (1) that two painting lines were not within the definition of

"coating lines," (2) that four painting lines were subject to the SIP refinishing exemption, (3) that four painting lines were not subject to regulation as they paint plastic as well as metallic parts, and (4) that the EPA was without jurisdiction due to insufficiency of the notice of noncompliance. A hearing was held before an Administrative Law Judge (ALJ) on March 4 and 5, 1986. The ALJ excluded evidence of technological and economic infeasability in that it was irrelevant to the issue of liability. He held that the offer of proof on economic infeasability evidence could be retained as proof on the penalty phase of the hearing.

The ALJ found Navistar in violation of the Ohio SIP (§ 3745-21-09)(U) of the Ohio Administrative Code). Navistar appealed to the administrator, who affirmed the ALJ's decision through the EPA's chief judicial officer. Navistar then sought review in this court.

II.

A. *Sufficiency of Notice*

Before addressing the merits of Navistar's arguments regarding the proper interpretation of the Ohio SIP, it is necessary to discuss whether the notice of noncompliance sent to Navistar was defective to such a degree as to render the EPA without jurisdiction in this case. Section 66.12, describing the contents of a notice of noncompliance, states:

> (a) Each notice of noncompliance shall be in writing and shall include:
>
> (1) A specific reference to each applicable legal requirement of which the source is in violation;
>
> (2) A brief statement of the factual basis for the finding of violation, together with a reference to any supporting materials and a statement of when and where they may be inspected.

(3) Instructions on calculating the amount of the penalty owed and the schedule for payments. Such instructions shall include (i) a statement of the date from which penalties should be calculated and (ii) a copy of the Technical Support Document and the Manual;

(4) Notice of the right to petition for a hearing to challenge the finding of noncompliance or to claim an exemption; and

(5) Notice that the penalty continues to accrue during the pendency of any hearings granted under this part or Part 67.

(b) Each notice of noncompliance shall be transmitted to the source owner or operator either by personal service or by registered or certified mail, return receipt requested.

40 C.F.R. § 66.12.

It is undisputed that the notice of noncompliance sent to Navistar did not contain the technical support document nor the instruction manual as required by 40 C.F.R. § 66.12(a)(3). Navistar argues that the omission of the material required by § 66.12(a)(3)(ii) renders the notice defective and leaves the EPA without jurisdiction in this case.

Several grounds require this court to reject Navistar's jurisdictional argument. First, § 66.12 provides no consequences for failure of the notice to comply with its requirements. Second, jurisdiction to assess noncompliance penalties is conferred upon the EPA pursuant to 42 U.S.C. § 7420. 42 U.S.C. § 7420(b)(3) requires only that a "reasonably specific notice of noncompliance" be sent.

Regulations under subsection (a) of this section shall—

. . . .

> (3) require the States, or in the event the States fail to do so, the Administrator, to give a brief but reasonably specific notice of noncompliance under this section to each person referred to in subsection (a)(2)(A) of this section with respect to each source owned or operated by such person which is not in compliance as provided in such subsection, not later than July 1, 1979, or thirty days after the discovery of such noncompliance, whichever is later; . . .

42 U.S.C. § 7420(b)(3).

The notice sent to petitioner notified it of each painting activity that was in violation of the SIP. It notified petitioner of its rights under the statute and of a right to a hearing. The only documents missing had to do with penalty calculations which would not be relevant as the liability hearing pursuant to 40 C.F.R. § 66.41-43 but would be relevant only later at the penalty hearing pursuant to 40 C.F.R. § 66.51-54. Thus, the notice complied with the "brief but reasonably specific" requirement of 42 U.S.C. § 7420(b)(3).

Finally, *Brock v. Pierce County,* 426 U.S. 253 (1986), instructs that failure to follow all procedural requirements does not automatically render an agency without jurisdiction to proceed. In *Brock,* a statute required that the agency must make a final determination within 120 days after receiving the complaint. Although this requirement was in mandatory language, no consequences for failure to comply were listed. The Court found that the failure of the agency to meet the 120-day requirement did not divest it of the power to seek penalties under the statute. The Court stated:

> We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake.

Id. at 255. Therefore, the failure of the notice of noncompliance to contain the instruction manual or the technical

support document does not prevent the EPA from proceeding with the liability hearing.

B. *Standard of Review*

Our standard of review in cases involving conflicting interpretations of an administrative regulation is to give considerable deference to the administrative agency's interpretation. *University of Cincinnati v. Heckler,* 733 F.2d 1171 (6th Cir. 1988). "[A]n administrative agency's interpretation of its own regulation is accorded considerable deference on judicial review unless it is inconsistent with the terms of the regulation. . . ." *Id.* at 1173-74.

Navistar argues that this court may subject administrative regulations to *de novo* review given the Supreme Court's decision in *INS v. Cardoza-Fonseca,* 94 L. Ed. 2d 434 (1987). *Cardoza-Fonseca,* however, is limited in its scope and does not justify *de novo* review of the regulations at issue in the instant case. The *Cardoza-Fonseca* case, resolving conflicting interpretations of a statute enacted under the Immigration and Naturalization Act, involved the question whether the standards for withholding of deportation and granting asylum were identical. The Court held that the agency interpretation of a statute is a matter of construction for the Court where the agency interpretation is contrary to clear congressional intent, and the agency itself has given the statute inconsistent interpretations. *Cardoza-Fonseca,* 94 L. Ed. 2d at 457-58.

We note first that this case involves an agency's interpretation of a regulation and not a statute.

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.
>
> . . . .

> When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.
>
> "Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14, 89 L.Ed. 1700, 1702, 65 S.Ct. 1215.

Udall v. Tallman, 380 U.S. 1 (1965).

Second, Navistar has not shown that the EPA has been inconsistent in its interpretation of the Ohio SIP. Finally, the EPA's interpretation of the Ohio SIP is in keeping with congressional intent, as more fully discussed in section C below.

C. *SIP Provisions Violated*

Navistar raises three arguments regarding the EPA's interpretation of the Ohio SIP. First, Navistar argues that two of its painting lines are not within the definition of "coating lines" for purposes of the SIP, because the painting lines do not have ovens for drying or baking. Significantly, the two painting lines emit more pollutants than allowed by the emission limitations under Ohio Administrative Code § 3745-21-09(a), which limits emissions from "coating lines."

Coating line is defined in the Ohio SIP as follows:

> "Coating line" means a series of one or more coating applicators, flash—off areas and ovens wherein a surface coating is applied, dried and/or cured.

Ohio Administrative Code § 3745-21-01(D)(8). Navistar argues that the definition requires that a coating line contain at

least one applicator, one flash—off area, *and* one oven. If Navistar's interpretation is correct, the two painting lines are not "coating lines" for purposes of the Ohio SIP, because they do not have ovens. The ALJ found the definition ambiguous, in that it could be read to mean one or more applicators, *or* one or more flash—off areas, *or* one or more ovens, *or* any of the combination of the above. "The definition can result," the ALJ stated, "in a series of one." While we would not be inclined to read the sentence that way, we cannot say, as a matter of law, that the sentence is so crystal clear as to allow only the meaning given it by Navistar. Neither can we ignore the ALJ's finding that the Environmental Protection Agency received numerous inquiries from industry sources inquiring "whether or not ovens were required in order to come within the definition."

The ALJ's more compelling reason for finding the meaning of "coating line" ambiguous is the fact that Ohio Administrative Code § 3745-21-09(U)(1) regulates emissions resulting from the application of surface coatings described in both (U)(1)(a)(iii) "Zinc rich primer" coatings, and (U)(1)(a)(iii), "extreme performance" coatings. (Text quoted *supra.*) "Zinc rich primer" coatings, (ii), are not dried by ovens, but at in-plant temperatures, while "extreme performance" coatings, (iii), are oven dried. The definition of "coating lines" applies to both, however. This suggests, as the ALJ held, that the listing of component elements in the definition of a coating line, should be read in the disjunctive not the conjunctive. We agree that the language defining "coating lines," is ambiguous.

A court may go beyond the express language of a statute or regulation to determine the intent of the draftsman if the language is ambiguous or if it would work against the purpose of the statutory goal. See *Int'l T & T Corp. v. General T & E Corp.*, 518 F.2d 913, 917-18 (9th Cir. 1975). When that is done in this case, the intent of the regulation and the goals of the Clean Air Act provide further support for the agency's interpretation.

The ALJ heard testimony from the draftsman of the relevant portion of the Ohio SIP. The draftsman, Mr. Juris, testified that "coating lines" was meant to include painting booths without ovens.[1] Furthermore, one of the fundamental purposes of the Clean Air Act is to maintain air quality standards by requiring emission reductions of organic compounds from major sources. The two painting lines at issue emitted 315 tons of compounds in 1985, nearly 200 tons above the allowable level. It would be an anomalous result to interpret the regulation so as to exclude coating lines without ovens when they contribute so greatly to the undesired pollutants in the air that are to be reduced by the regulations.

Mindful "that an agency's ... interpretation of its own regulation is accorded considerable deference," *University of Cincinnati*, 733 F.2d at 1173, we find the ALJ's interpretation to be consistent with the terms of the regulation.

Second, Navistar argues that three of its painting lines are subject to the refinishing exemption of the Ohio SIP. Section 3745-21-09(U)(2)(c) of the Ohio Administrative Code exempts "application of a refinishing coating to motor vehicles." The ALJ found that the petitioner's processes do not involve refinishing.

Navistar's "refinishing lines" are used to correct paint defects on newly manufactured trucks prior to releasing them for sale. The EPA argues that the refinishing exemption does not apply to newly manufactured trucks but to body shops in the motor vehicle aftermarket.

Again, the intent behind the regulation supports the EPA's interpretation as evidenced by the testimony of the draftsman who stated that the refinishing exemption applies only to the

[1] The ambiguity over whether "coating lines" includes painting booths has been resolved by a subsequent revision of the language, according to the testimony of the draftsman.

motor vehicle aftermarket. In addition, the EPA has consistently interpreted the refinishing exemption to apply only to the aftermarket as evidenced by a 1981 letter to Navistar indicating that the exemption was not applicable to Navistar's operations. "Ordinarily we defer to an agency's consistent interpretation of its own regulations unless 'plainly erroneous or inconsistent with the regulations.' " *Patton v. National Mines Corp.*, 825 F.2d 1035, 1038 (6th Cir. 1987) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

Navistar responds that the regulations applicable to surface coating of automobiles and light duty trucks specifically exempt aftermarket body shops whereas the regulations applicable to surface coating of heavy duty trucks contain no such specific exclusion. The difference in language evidences an intent that the exemption governing surface coating of heavy duty trucks is not to be limited to the aftermarket, according to Navistar. However, because of the deference owed to an agency's interpretation of its own regulations, and because that interpretation is not inconsistent with the terms of the regulation, *University of Cincinnati v. Heckler, supra,* it must be upheld.

Finally, Navistar argues that four of its lines are used to paint metal and nonmetal parts. The emissions limitations of the SIP apply to "miscellaneous metal part or product coating lines." Section 3745-20-09(U)(1). One painting line uses five percent of its paint on non-metal parts; the other three painting lines use thirty-one percent of their paint on non-metal parts. Emissions from these processes should be excluded from regulation, according to Navistar.

The EPA argues that "coating lines" are regulated by the SIP, and that petitioner's concession that the coating lines are used, in part, to paint metallic parts renders them subject to regulation.

The EPA's interpretation is consistent with the plain language of the SIP. Further, it is in keeping with the goal of

the Clean Air Act to reduce emission of organic compounds from operations such as those employed by Navistar. Again, the deference due the agency's own interpretation requires this court to affirm the administrator's decision as to this issue.

D. *Evidence of Technological and Economic Infeasibility*

Prior to the hearing before the ALJ, the EPA filed a motion *in limine* to exclude from the liability hearing evidence by Navistar of the technological and economic infeasibility of compliance with the SIP. The ALJ excluded the evidence from the liability hearing. He found, and the parties had earlier agreed, that the hearing before the ALJ was only to determine whether petitioner was liable for not being in compliance with the Ohio SIP. 40 C.F.R. § 66.41-43. A second hearing would be held to determine what the penalty for non-compliance would be. 40 C.F.R. § 66.41-54. The ALJ ruled that the evidence of infeasibility "may be retained in the record as an offer of proof on the issue of liability for a penalty (second stage of hearing)."

Technological and economic infeasibility arguments were first raised in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), by a petitioner who was challenging the SIP itself as opposed to that petitioner's compliance with the SIP. In that context, the Court held that technological and economic infeasibility arguments were not to be heard. The Court found that such a requirement would thwart the goals of and legislative intent behind the Clean Air Act. *Id.* at 269. The Court specifically left open the question of whether due process requires the claims of technological and economic infeasibility be heard at some time. *Id.* at 269, n.19.

This court spoke to the due process issue in *United States v. Ford Motor Co.*, 814 F.2d 1099 (6th Cir. 1987). In *Ford*, the company had challenged a SIP provision on infeasibility grounds in state court. This court held that a state court

judgment does not preclude federal enforcement of the SIP. The company then argued that due process is violated by such a holding in that the state forum is the only forum in which to raise the infeasibility claims. This court stated:

> Ford's contention can best be answered by noting that the Clean Air Act envisions situations where standards currently economically or technologically infeasible will nonetheless be enforced. *See Union Electric Co. v. EPA*, 427 U.S. 246, 258-59, 96 S.Ct. 2518, 2526, 49 L.Ed.2d 474 (1976); *National Steel Corporation Great Lakes Steel Division v. Gorsuch*, 700 F.2d 314, 324-25 (6th Cir. 1983). Congress has the authority to demand that "existing sources of pollutants either should meet the standard of the law or be closed down. . . . ", regardless of whether such standards are currently feasible. S.Rep. No. 91-1196, p. 2-3 (1970), quoted in *Union Electric Co., supra*, 427 U.S. at 259, 96 S.Ct. at 2526.
>
> In addition, we note that meaningful opportunities for raising claims of technological and economic infeasibility have been provided by the Act.
>
> . . . .
>
> [T]echnical infeasibility coupled with good faith efforts can be considered by the district court as a factor mitigating against the imposition of monetary penalties in the enforcement action.

Ford Motor Co., 814 F.2d at 1103-04. *See also, United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1087 (3rd Cir. 1987).

Given Congress' intent to obtain compliance or require that facilities be shut down, regardless of feasibility, and given that due process concerns are satisfied by allowing infeasibility arguments at the penalty stage, we affirm the ALJ's decision to exclude evidence of technological and economic infeasibility at the liability hearing. As the evidence was retained in the record for purposes of the penalty hearing, any due process requirements were met.

III.

For the reasons stated above, the administrator's decision finding Navistar in violation of the Ohio SIP is **AFFIRMED.**

APPENDIX B

APPENDIX B

No. 87-3474

United States Court of Appeals

FOR THE SIXTH CIRCUIT

NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Before: KENNEDY and RYAN, *Circuit Judges;* and PECK, *Senior Circuit Judge.*

JUDGMENT

ON PETITION TO REVIEW a decision of the United States Environmental Protection Agency.

THIS CAUSE came on to be heard on the transcript of record from the said agency and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said agency in this cause be and the same is hereby affirmed.

IT IS FURTHER ORDERED that Respondent recover from Petitioner the costs on appeal, as itemized below.

ENTERED BY ORDER OF THE COURT

Leonard Green, *Clerk*

/s/ Leonard Green, *Clerk*

Issued as Mandate: November 23, 1988

A True Copy.

Costs: Respondent to recover costs from petitioner

Attest:

Filing fee	$ None
Printing	$252.00
Total	$252.00

/s/ George McCarthy
Deputy Clerk

APPENDIX C

APPENDIX C

No. 87-3474

United States Court of Appeals

FOR THE SIXTH CIRCUIT

NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Order

Before: KENNEDY and RYAN, *Circuit Judges,* and PECK, *Senior Circuit Judge*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, *Clerk*

APPENDIX D

APPENDIX D

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of: INTERNATIONAL HARVESTER COMPANY, *Respondent* Docket No. CAA-120-V-84	CAA (120) Appeal No. 87-1

FINAL ORDER

International Harvester Company (Harvester or Respondent)[1] owns and operates a truck assembly plant in Springfield, Ohio. On September 28, 1984, EPA Region V issued a notice of noncompliance against Harvester under section 120 of the Clean Air Act, 42 U.S.C. § 7420, and the Agency's implementing regulations, charging that it failed to comply with certain emission limitations for volatile organic compounds set forth in the Ohio State Implementation Plan (SIP) at OAC § 3745-21-09(U).

After an evidentiary hearing in which Respondent challenged the notice of noncompliance, the Administrative Law Judge (ALJ or Judge Vanderheyden) found that Respondent violated the Ohio SIP, as charged by EPA Region V (Complainant). Prior to the hearing the ALJ had granted Complainant's motion in limine to preclude Respondent from

[1] Shortly after these proceedings began International Harvester changed its name to Navistar International Corporation. To maintain consistency with the pleadings and record below, Harvester or Respondent will be the appellation used in this decision.

submitting evidence relating to its claim that it could not comply with the Ohio SIP because of technological and/or economic infeasibility.

Respondent appeals[2] the ALJ's decision granting the motion in limine, and the initial decision in which the ALJ found EPA had jurisdiction to proceed against Respondent under section 120 and that Respondent was in violation of OAC § 3745-21-09-(U).[3]

The initial decision and the ruling on the motion in limine are affirmed, and all findings of fact, conclusions of law and reasons therefor in these decisions are adopted and incorporated by reference in this final decision.[4] The parties have not raised any new matters on appeal that are material to the outcome; the discussion below is provided only to expand upon the ALJ's ruling on the motion in limine.

Discussion

Judge Vanderheyden granted Region V's motion in limine to exclude from this stage of the proceedings (which is con-

---

[2] Respondent hand-delivered its appeal to the EPA hearing clerk on February 17, 1987. However, contrary to its certificate of service, Respondent did not hand-deliver the appeal brief to the Chief Judicial Officer on February 17, 1987. The Chief Judicial Officer received Respondent's appeal on February 20, 1987.

[3] On March 9, 1987, EPA Region V submitted a motion to file a reply brief to Harvester's appeal. Since Region V has the right to file a response to Harvester's appeal pursuant to 40 CFR §§ 66.91 and 22.30(a)(2), I do not find it necessary to rule on this motion.

[4] That an appellate administrative tribunal may adopt the findings, conclusions, and rationale of a subordinate tribunal without extensive restatement is well-settled. United States v. Orr, 474 F.2d. 1365 (2d Cir. 1973); Carolina Freight Carrier Corporation v. United States, 323 F. Supp. 1290 (W.D.N.C. 1971); In re Electric Service Company, TSCA Appeal No. 82-4, Final Decision (January 7, 1985; In re Chemical Waste Management, Inc., RCRA (3008) Appeal No. 84-8, Order Adopting the Presiding Officer's Initial Decision as Final Agency Action (September 5, 1984); and cases cited in Ciba Geigy v. Farmland Industries, FIFRA Comp. Dkt. Nos. 33, 34 and 42 (Op. of the Judicial Officer, April 30, 1981).

cerned solely with the question of liability, not with assessment of a penalty) any evidence regarding the alleged technological and/or economic infeasibility of Respondent complying with the Ohio SIP. Judge Vanderheydan found nothing in the language of section 120 that would allow Respondent to assert technological and/or economic infeasibility as a defense to liability for noncompliance penalties. In ruling against admission of Respondent's evidence on infeasibility, he also relied on a decision by Administrative Law Judge Harwood, which held that claims of economic unreasonableness and technological infeasibility are beyond the scope of section 120 proceedings. *Dietzgen Corp.*, Docket No. CAA-120-V-84-1 (Oct. 18, 1985) (Decision on Motion in Limine).

In addition, Judge Vanderheyden noted that confining the hearing to the issue of liability would serve judicial economy, and accord with the Congressional intent that section 120 proceedings be resolved within an expedited time frame. *See* 42 U.S.C. § 7420(b)(5) (directing EPA to promulgate regulations calling for the Administrator to make decisions on petitions challenging a notice of noncompliance within 90 days). The ALJ did, however, allow the Respondent to submit evidence of infeasibility as an offer of proof to be retained in the record.

I conclude that the ALJ properly excluded the evidence of infeasibility for the above reasons. Furthermore, since I construe the section 120 regulations as precluding any consideration of infeasibility for purposes of determining liability, any claim by Respondent to the contrary must be regarded, in effect, as an attack on the validity of the regulations, which, of course, Respondent cannot do now, for the regulations are final and will not be reconsidered here. Harvester could have challenged the section 120 regulations in the appropriate circuit court of appeals within 60 days of promulgation, but is now precluded by the passage of time from seeking judicial review of any regulations issued under section 120.[5] 42 U.S.C.

[5] EPA's section 120 regulations were challenged by industry

(Footnote continued on following page.)

§ 7607(b)(1). Because Congress thus prohibited untimely challenges to the validity of section 120 regulations in judicial proceedings, EPA will not now entertain an attack on the validity of the regulations in these administrative proceedings. A major purpose of rulemaking "is to narrow the inquiry" conducted in adjudications. *See National Petroleum Refiners Association v. FTC,* 482 F.2d 672, 675 (D.C. Cir. 1973). If Harvester or others could attack at will the validity of regulations in administrative proceedings, the scope of the inquiry would not be narrowed and the rule would not be a rule at all.

The section 120 regulations address technological and economic infeasibility in a specific and limited manner; therefore, it is reasonable to conclude that this is the only manner in which these claims can be raised in a section 120 proceeding.

The regulations, which appear at 40 CFR Part 66, establish a two-step procedure that addresses liability and penalties separately. The instant proceedings involve the first phase only, that is, whether Respondent is liable for violating the Ohio SIP and whether Respondent qualifies for an exemption from paying noncompliance penalties. After a source is determined to be in violation of the SIP and not exempt, then the parties proceed to the second phase, wherein a source can challenge the amount of penalties it owes.[6] It is during the second phase that the regulations permit consideration of technological infeasibility.

(Footnote continued from preceding page.)

petitioners under 42 U.S.C. § 7607(b). The court, in Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983), upheld the regulations, and in particular approved EPA's refusal to promulgate an exemption from noncompliance penalties for technological infeasibility. The court did remand some of the regulations, but the matters remanded are not relevant here.

[6] Section 120 directs EPA to assess a penalty against a noncomplying source equal to any economic benefit the source receives by remaining in noncompliance. 42 U.S.C. § 7420(d).

EPA recognized the difficulty of assessing a penalty if there is no existing technology to meet a SIP requirement, and provided in 40 CFR § 66.21(b) that EPA would calculate the penalty in such situations based on the cost of control that best approximates the degree of control required. Thus, a source that has taken and is continuing to take all possible steps to achieve compliance, including the installation of the best available controls, would be considered to be deriving no economic benefit from its failure to comply. 45 Fed. Reg. 50,096 (July 28, 1980) (preamble to the final § 120 regulations). Since the regulations specifically allow consideration of a claim of technological infeasibility during the penalty phase, the omission of technological infeasibility from the liability stage strongly implies that it should not be considered for purposes of determining liability.

Economic infeasibility, in contrast, can be considered during the liability phase under EPA regulations, but *only* in the context of seeking an exemption from noncompliance penalties, and only if the prerequisite for obtaining an exemption is first satisfied. An exemption is available for a source unable to comply with a SIP requirement because of reasons entirely beyond its control, provided the source has first obtained a delayed compliance order under section 113(d) of the Act, or a federal or EPA-approved state judicial decree or order that has the effect of delaying compliance. 42 U.S.C. § 7420(a)(2)-(B)(iv); 40 CFR § 66.31. EPA implemented this "inability to comply" exemption provision in a carefully restricted manner, in keeping with the Congressional intent that the exemption be narrowly construed.[7] 40 CFR § 66.31; *See* H.R. Report 95-294,

[7] During the section 120 rulemaking proceedings, commenters argued that sources subject to SIP requirements that are technologically infeasible and sources unable to obtain capital for pollution control equipment should be exempt from non-compliance penalties. After considering both comments, EPA rejected the

(Footnote continued on following page.)

95th Cong., 1st Sess 76 *reprinted in* 4 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977 at 2543 (1978); 40 CFR § 66.31(c)(5)(1984) (Inability to obtain financing for pollution control equipment constitutes a reason beyond the control of the owner to the extent that such inability resulted from temporary, verifiable, general market conditions.). So, if a source meets the prerequisite for the "inability to comply" exemption, then economic infeasibility that results from reasons entirely beyond the control of the source can be raised in these proceedings.

In this case Respondent's evidence of economic infeasibility cannot be considered relevant to show entitlement to an "inability to comply" exemption because Respondent has not met the prerequisite for this exemption, *i.e.,* Respondent has not received a delayed compliance order under section 113(d) of the Act, or judicial decree allowing it to delay compliance beyond the deadline in the SIP. In fact, Respondent conceded that it did not meet the prerequisite for this exemption in the Joint Pretrial Submittal at 13. Jt. Ex. 1 at 13-14.

Since the statute and regulations bestow this opportunity for a source to raise economic infeasibility claims in a limited and specific manner, the conclusion is that such claims cannot otherwise be raised during these section 120 proceedings.

This conclusion is bolstered by the fact that the Clean Air Act allows claims of technological and economic infeasibility to be considered in other situations. For example, Respondent could have raised its claims of infeasibility with the Ohio

---

(Footnote continued from preceding page.)

suggestions as contrary to Congressional intent. 45 Fed. Reg. 50,096-97 (July 28, 1980). Regarding economic infeasibility, EPA stated: "There is no indication that Congress meant to exempt sources that were experiencing economic difficulties except where those difficulties are due to temporary, verifiable market conditions." *Id.* at 50,097. As previously noted, the regulations were upheld on judicial review.

Environmental Protection Agency when that agency was formulating the state implementation plan, *see generally* 42 U.S.C. § 7410(a), for as long as the national standards are met, a state can seek to accommodate industries with particular economic or technological problems by selecting whatever mix of control devices it desires. *Union Electric Co. v. EPA*, 427 U.S. 246, 266 (1976). Failing to get an accommodation in the plan, Respondent could have sought a variance from the SIP requirement from the state.[8] *Id.;* 42 U.S.C. § 7410(a)(3)(A). In addition, in an enforcement action under section 113(b), 42 U.S.C. § 7413(b), federal district courts can consider economic and technological factors, not as a defense to the violation, but in fashioning the appropriate relief.[9]

For all the foregoing reasons, I conclude that evidence of alleged technological and economic infeasibility was properly excluded from the liability phase of these proceedings. The initial decision and ruling on the motion in limine are affirmed.

So ordered.

/s/ Ronald L. McCallum
Ronald L. McCallum
Chief Judicial Officer

Dated:

---

[8] Respondent did seek a variance from Ohio EPA after EPA issued the notice of noncompliance in this case. According to Respondent, the Ohio EPA approved a variance from the SIP requirement at issue on February 19, 1986, and subsequently submitted the variance to EPA for approval.

[9] Union Electric v. EPA, 593 F.2d 299, 306 (8th Cir. 1979); Friends of the Earth v. Potomac Electric Power Co., 419 F. Supp. 528, 535 (D.D.C. 1976); *see also* Complainant's Reply Brief at 57.

APPENDIX E

APPENDIX E

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of: INTERNATIONAL HARVESTER COMPANY, *Respondent*	Docket No. CAA-120-V-84-1

Clean Air Act (Act), Section 120: Respondent held to be a major stationary source under Section 302 of Act, and as defined in 40 C.F.R. § 66.3(g), and to be in violation of applicable emission limitations contained in Ohio State Implemation Plan, Ohio Administration Code (OAC), § 3745-21-09(U), regarding coating (painting) operations at its Springfield, Ohio, facility; it being further held that service of Notice of Noncompliance not jurisdictionally defective; that respondent's coating lines are subject to regulation under OAC whether or not they contain ovens, and when coating nonmetal as well as metal parts; and that respondent not entitled to a refinishing exemption.

APPEARANCES:

For Complainant:
Carey S. Rosemarin, Esquire
Stephen P. Mendoza, Esquire
Patricia L. Winfrey, Esquire
Assistant Regional Counsel
U. S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

For Respondent:
Donald W. Rupert, Esquire
James H. Schink, Esquire
Jonathan B. Newcomb, Esquire
Kirkland & Ellis
200 E. Randolph Drive
Chicago, Illinois 60601

INITIAL DECISION

Introduction

International Harvester's primary business activity consists of the manufacture and sale of medium size and heavy duty trucks. It engages in certain painting activities associated with its truck body and manufacturing facilities in Springfield, Ohio. (Ex. R-10 at 2) It is these painting or coating activities which are the subject of this litigation. The State of Ohio promulgated a rule or regulation dealing with the control of volatile organic compounds (sometimes VOC) which was formally submitted to the U. S. Environmental Protection Agency (sometimes U. S. EPA or complainant) as a revision to its State Implementation Plan (SIP). Upon approval by U. S. EPA it became a federally enforceable portion of the Ohio SIP. That portion of the SIP in issue, which will be addressed with particularity below, is found in the Ohio Administrative Code (OAC) 3745-21-09-(U). On September 28, 1984, U. S. EPA issued a Notice of Noncompliance (sometimes NON) to respondent* pursuant to Section 120 of the Clean Air Act, 42 U.S.C. 7420 (Act). The complaint charged that certain painting operations at respondent's Springfield, Ohio, plant were in violation of the Ohio SIP. The OAC 3745-2109-(U) provides, in short, that no owner or operator of a miscellaneous metal part coating (painting) line may permit the discharge into the ambient air of any VOC from such coating line unless the requirements of either subsections (U)(1)(a) or (b) are met. The former provides for VOC emission limitations for various types of coating operations. The latter provides for equipping the miscellaneous metal part or product coating line with a capture system and associated control efficiencies for VOCs. Subsection (U)(2) provides for

* Shortly before the hearing, respondent changed its name to Navistar International Corporation. In the interest of consistency and clarity, either "respondent" or "International Harvester" will be used in this decision.

certain exemptions. Specificaly at issue here is subsection (1)(a) (iii) which provides that the VOC content for each coating employed in the miscellaneous metal part or product coating line should not "3.5 pounds per gallon of coating, excluding water, for an extreme performance coating." Additionally, the "refinishing" exemption under subsection (U)(2) is in contention.

The parties entered into a stipulations of facts which, in pertinent part, established the following: Respondent operates 10 coating lines at its facility which are alleged to be in violation of the SIP. These are:

1. P001 (#57 Paint Spray Booth and Bake Oven)
2. P002 (#58 Medium Duty Body Spray Booth and Oven)
3. P003 (#59 Two-Tone and Repair Spray Booth and Oven)
4. P004 (#61 Two-Tone and Repair Spray Booth)
5. P007 (#64 Parts Spray Booth and Bake Oven)
6. P008 (#77 Paint Repair Booth and Oven)
7. P008 (#78 Paint Repair Booth and Oven)
8. P009 (#26 Wheel Paint System)
9. R004 (Line 1 Chassis Spray Booth)
10. R005 (Line 2 Chassis Spray Booth) (J. Ex. 1 at 11-12)

Each of the above coating lines paints metal parts and products. The metal parts and products do not include cans; coils; metal furniture; large appliances; aluminum or copper wire prior to its formation into an electromagnetic coil; or the frame, main body or other exterior sheet metal of an automobile or light duty truck while it is located at an automobile or light duty truck assembly plant. (J. Ex. 1 at 14) Respondent stipulated that neither the bake ovens nor water wash systems

of any of the above mentioned coating lines constitute capture systems or associated control systems within the meaning of OAC § 3745-21-09(U)(1)(b); and that there currently exists no equipment at respondent's facility that constitute such systems within the meaning of the provision. (J. Ex. 2 at 1-2) The coatings used on the above 10 lines are designed for exposure to year round, outdoor weather; detergents; scouring; solvents; corrisive materials; corrosive atmospheres; and similar harsh conditions, which coating may be described as extreme performance coatings. From January 14, 1983, to the date of the stipulation, respondent has used coatings on the coating lines listed below, which coatings have VOC emissions as follows:

Line	VOC Content, Excluding Water (lbs/gal.)
P001 (#57)	4.44
P002 (#58)	4.86
	3.92
P003 (#59)	4.86
	3.92
P004 (#61)	4.44
P007 (#64)	4.86
	3.92
P008 (#77)	3.92
	4.44
	5.32
P008 (#78)	3.92
	4.44
	5.31
P009 (#26)	4.86
	3.92
R004 (Chassis #1)	3.92
	5.31
R005 (Chassis #2)	3.92
	5.31

Each of these lines emits, and since September 28, 1984, the date of the NON, continues to emit VOCs into the ambient air.

(J. Ex. 2 at 14-16)* In 1985, respondent emitted approximately 650 tons of VOCs into the ambient air. (Ex. R-6 at Ex. A)

ANALYSIS AND FURTHER FINDINGS OF FACT

1. *Notice of Noncompliance*

Brent Marable (Marable) is an environmental engineer with complainant. He examined the NON (and other related documents) prior to its issuance by the Regional Administrator. At that time, it contained the "entire package." It included the Technical Support Document, and the Instruction Manual for Section 120 noncompliance penalties. There was an unspecified time lapse between Marable's review and mailing of the envelope. He did not put the package together and mail it to respondent; nor did he know who mailed the envelope and it probably was not his secretary. (Ex. C-1 at 2; Tr. 101, 114) Steven Covey (Covey) is a senior attorney at the respondent's headquarters since 1981, working in its law department. He is the attorney having primary responsibility concerning the receipt of documents. Incoming mail to respondent is first sorted in the main mailroom, then sent to the appropriate departmental mailroom where it is placed in the addressee's mailbox. After that, the U. S. EPA envelope in question was handled by at least two, but no more than three, people before it was delivered to Covey. In late September or early October 1984, Covey received a letter, and certain documents from complainant, addressed to Jack Rutherford (Rutherford), the then President of respondent. When Covey received the envelope it had been opened by Rutherford's secretary. The documents were paper clipped to the outside of the original

* In the stipulation line R001 (#92) with a VOC content of 3.92, 4.44 and 5.31 was included. In a pretrial submittal of March 4, 1986 (J. Ex. 2), complainant dismissed with prejudice its claim that line R001 at any time since commencement of this action was in violation of OAC § 3745-21-09(U).

envelope. The letter referred to various items that were enclosed. The materials received by Covey contained the NON and certain sections of the Code of Federal Regulations and the Rules of Practice, 40 C.F.R. Part 22. The documents received by Covey did not include copies of the noncompliance penalty regulations, Technical Support Document and Instruction Manual that were mentioned in the covering letter. Covey reopened the envelope, and tore it apart before discarding it to make certain it contained no other materials. He got in touch with each person who handled the materials to determine whether or not they removed anything from the envelope. These included secretaries who handled the opened envelope and Covey was told that they neither discarded or retained any of the envelope's enclosures. In Covey's five year tenure at respondent's headquarters he is not aware of any occasion where an item addressed or directed to him in the respondent's intra-office mail was lost. It is found that the Technical Support Document and the Instruction Manual were not enclosed with the NON sent to respondent. Covey had the telephone number of complainant's counsel, but he did not call him concerning the missing documents. The missing material related to penalty calculations. The pleadings show that the missing documents had been published officially. (45 Fed. Reg. 50122-50240, July 20, 1980) This citation and its reference to penalty were cited in both the NON and the transmittal covering letter. Covey acknowledged that he read the documents sometime after receiving the NON. Additionally, the pleadings show that counsel for respondent had dealings with complainant following receipt of NON, moving for extensions of time on three occasions. Further, discovery between the parties was undertaken following the NON and notwithstanding the absence of the documents. The pleadings also addressed the penalty calculations. The missing documents were subsequently sent to respondent's counsel. Counsel for respondent admitted that he was subsequently provided with missing material by complainant's counsel. Covey stated that he did not know of any

harm that came to respondent as a respondent as a result of the omission of the documents. (Ex. R-1; Tr. at 101, 114, 122-127, 131-133, 138, 139)

2. *Coating Line:*

Lines R004 and R005 do not have ovens. William Juris (Juris) an official in the Ohio Environmental Protection Agency (OEPA) drafted Section 38745-21-09(U) and the definition of "coating line" in the OAC. For the year 1985, R004 and R005 emitted 236 tons and 79 tons of VOC, respectively, for a total of 315 tons. This accounts for about 50 percent of the total VOC emissions of all respondent's lines. (Ex. R-6, Ex. A).

James Nooks (Nooks) is employed by respondent as a supervisor, Plant Equipment and Layout, and the employee chiefly responsible for environmental matters. (Ex. R-6; Tr. 219-220). In 1985, respondent, in the person of Nooks, applied to the OEPA for a variance for lines R004, R005 and other lines, from the requirements of Section 3745-21-09(U), stating that higher emission limits were needed than that prescribed. A variance was granted until December 31, 1987. With reference to R004 and R005, the "Equipment Description" in the variance states "Miscellaneous Metal parts *coating line*" (emphasis supplied), and the Special Terms and Condition of the variance state that it is in lieu of the requirements of 3745-2109(U)(1)(a)(iii). (Ex. C-1, attachments G, H, I) The resolution of the "coating line" question, however, is essentially one of legal interpretation and will be treated more fully below under Discussion and Conclusions of Law.

3. *Coating Operations*

The second and third issues in this proceeding concern the painting of non-metallic parts and the question of respondent's refinishing operations. Respondent's operations concerning these questions will be addressed below.

Respondent's facility consists of one building being approximately 2,000,000 square feet in area, of which about 60,000 square feet are used for two offices. The remainder is devoted to manufacturing activity, of which the painting department is one of the discrete units. The coating or painting operations are conducted in different areas of the plant. The painting booths in issue vary in size from approximately 1,000 to 9,000 square feet. The coating booths or lines perform the following operations with reference to the parts that are painted.

Line No.	Parts Coated
P001	Cabs, hoods, etc., 5 percent non-metallic parts
P002	Cabs, hoods, etc., 31 percent non-metallic parts
P003	Cabs, hoods, etc., 50 percent refinishing, 31 percent non-metallic parts
P004	Heavy duty cabs; multi-tone systems; 50 percent refinishing
P007	Miscellaneous small metal parts; 31 percent non-metallic parts
P008	100 percent refinishing of all parts
P009	Wheels
R004	Medium duty chassis
R005	Heavy duty chassis

Parts to be coated in the coating lines are conveyed into the respective booths on overhead conveyor lines. In the case of lines R004 and R005 the conveyor is installed in the floor. Once the parts are in the painting booth an operator paints them with a paint applicator or spray gun. Except for the parts painted on lines R004 and R005, the parts are then conveyed into ovens for drying and baking. Lines R004 and R005 do not have ovens.

Some of the lines or booths are used to paint non-metallic parts. Non-metallic parts are made only from non-metallic materials and have no metal formed on them. The table above sets forth the percent of non-metallic parts painted in the respective lines. The percentage was determined by respondent

on the basis of the surface area of non-metallic parts painted to the total surface area of all parts painted in the designated booth.

Some of respondent's painting booths also serve the function of "refinishing." The refinishing operations in terms of the amount of paint used on the respective lines is also set out on the table above.

The total amount of paint used by respondent for 1985, its total VOC emissions, and other pertinent data is reflected in Exhibit A attached to respondent's Exhibit 6. With reference to this, respondent represents that the amount of VOC accounted for in painting non-metallic materials, and in the refinishing process, was 104.1 tons in 1985, as reflected in the following table:

Line No.	Percent Non-Metallic	Percent Re-finishing	Total VOC (Tons)	VOC Attributed to Non-Metal and Refinishing
P001	5	0	83.8	4.2
P002	31	0	125.1	38.8
P003	31	50	18	14.6
P004	0	50	19.7	9.6
P007	31	0	52	16.1
P008	0	100	20.8	20.8
				104.1

(Ex. R-6 at 2-6, 11; Tr. 186)

The percentages of non-metallic parts painted and that used for refinishing varies. Respondent was unable to provide these percentages for on or about September 28, 1984. It would have been basically the same as 1985, however, as the same types of products went through the system. The same paint is sprayed on metallic parts as on non-metallic parts. Respondent's lines P001, P002, P003 and P007 coat or paint both metallic and non-metallic parts. When the hanger is traveling through the spray booths on these lines, there are times when

both metal and non-metal parts are attached to it. This would also have been the case on or about September 29, 1984. (Tr. 187-209, 258-259)

Concerning "refinishing," respondent's lines P003 and P004 are used 50 percent of the time for this process, and it is 100 percent in the case of line P008. (Ex. R-6 at 5). Respondent's "refinishing" process is the touching-up of missed areas and scratches that occur on its newly painted trucks. It also embraces quality problems in the paint such as it being too thin or dirt on the finish. Until these problems are corrected the trucks are not completed, finished or ready for delivery. (Tr. 221-226)

DISCUSSION AND CONCLUSIONS OF LAW

1. *Notice of Noncompliance*

The pertinent regulation, 40 C.F.R. § 66.12, addresses the content of the NON. In significant part it provides as follows:

> (a) Each notice of noncompliance shall be in writing and shall include:
>
> * * *
>
> (3) Instructions on calculating the amount of penalty owed and the schedule for payments. Such instructions shall include (i) a statement of the date from which penalties should be calculated and (ii) a copy of the Technical Support Document and the Manual.

The latter documents were not included with the NON. For the reasons stated in its brief respondent's position is that complainant did not follow its own regulations to include the documents; that because an incomplete NON was sent to respondent it was a fatal omission, jurisdictional in nature; and U.S. EPA lost jurisdiction to proceed to have the matter adjudicated. (R. Op. Br. at 13-16) Respondent draws a parallel

between a civil complaint and the NON, stating "... just as a civil complaint is invalid where service of process is not proper, the incomplete NON sent to [respondent] was not sufficient to confer jurisdiction on [U.S. EPA]." (R. Op. Br. at 13) Respondent's comparision to a civil complaint is not persuasive. Fed. R. Civ. P. 4 provides for the service of process in the federal courts and it may be used as an analogy. Rule 4 should be liberally construed in the interest of doing substantial justice and the propriety of service in each case should turn on its own facts. This is consistent with the modern concept that service of process is primarily a notice giving device. *United Food and Commercial Workers Union v. Alpha Beta Company,* 736 F.2d 1371, 1382 (9th Cir. 1984); *FTC v. Compagnie de Saint—Gobain Point-A-Mousson,* 636 F.2d 1300, 1312, n. 61 (D.C. Cir. 1980); 4 Wright and Miller, Federal Practice and Procedure, Civil § 1083. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson,* 355 U.S. 41, 48 (1957); *Hildebrand v. Honeywell, Inc.*, 622 F.2d 179, 181 (5th Cir. 1980). The transmittal letter with the NON provided adequate notice to respondent referring to the official citation where the penalty calculations were cited. Respondent's counsel was subsequently provided with the missing documents and Covey admitted that no harm befell respondent from the omission of the documents. Absent a showing of prejudice resulting from such a procedural defect a dismissal is not warranted. *United Food & Commercial Workers Union v. Alpha Beta Company, supra.* Additionally, respondent had dealings with complainant following the defective service, applying for and receiving three extensions. In a similar situation, when the summons served on defendant did not bear a facsimile of the clerk's signature, the seal of the court, or defendant's name, was undated, and required a response to the complaint service was void. However, discovery was going forward and defendant

obtained three stipulations extending the time to answer. It was held that defendant would be estopped to deny service of process. *Maricopa County v. American Petrofina, Inc.*, 322 F. Supp. 467 (D. C. Cal. 1971). The service of the NON was sufficient, on the facts of this case, to confer jurisdication on U.S. EPA to proceed with adjudication.

2. *Coating Line*

The pertinent language of OAC § 3745-21-09(U) is as follows:

(U) Surface coating of miscellaneous metal parts and products.

(1) Except where exempted under paragraph (U)(2) of this rule, no owner or operator of a miscellaneous metal parts or product *coating line* may cause allow or permit the discharge into the ambient air of any volatile organic compounds from such *coating line,* after the date specified in paragraph (c)(28) of Rule 3745-21-04 of the Administrative Code unless the requirements of either paragraph (U)(1)(a) or (U)(1)(b) of this rule are satisfied. (Emphasis supplied)

(a) The volatile organic compound content of each coating employed . . . does not exceed the least stringent of any of the following limitations which are applicable:

* * *

(iii) 3.5 pounds per gallon of coating, excluding water, for an extreme performance coating;

To come within the purview of OAC § 3745-21-09(U), sometimes hereinafter Section, there most exist a "coating line." The definition of "coating line" is found in Section 3745-21-01-(D)(8) of the OAC and reads:

"Coating line" means a series of one or more coating applicators, flash-off areas and ovens wherein a surface coating is applied, dried, and/or cured.

Section 3715-21-01-(D)(32) defines "oven" to mean "a chamber within which heat is used for one or more of the following purposes: dry, bake, cure or polymerize a surface coating." Respondent argues that a plain reading of the definition of "coating line" requires that it contain three separate components, a coating application, a flashoff area and an oven; that in any event it must contain an oven. In that lines R004 and R005 do not have ovens respondent's view is that they do not come within the scope of the Section. Complainant urges that the definition is ambiguous; that the definition can be read to include or not include coating lines that lack ovens; and that the evidence shows that an oven is not required to bring the coating activity within the definition.

A quick, surface reading of the definition of "coating line" would seem to indicate that its meaning is plain and clear and that an oven is required. A closer examination shows, however, that there is some confusion and conflict within the definition. For example, while the definition appears to demand a "series" of components it also requires "one or more" of the three components, applicators, flash-off areas and ovens. The definition can result in "a series of one." Ambiguity did and does exist concerning the definition of "coating line." Juris is the person who drafted the definition of "coating line." He provided evidence that OEPA field offices had received inquiries from sources who believed the definition to be unclear concerning whether or not ovens were required in order to come within the definition. (Ex. C-2, at 3) Where such ambiguity exists it is incumbent to make a search for legislative intent. The purpose of the Act and the apparent goal of the OAC is to provide, among others, for the enhancement of the quality of the Nation's air resources so as to promote the public health and welfare. Section 1 of Act, 42 U.S.C. § 7401.

Where the language of a statute, as in the case of "coating line," may be susceptible of two interpretations, it should be interpreted in a manner which effectuates rather than frustrates

the purpose of the legislative draftsman. *Shapiro v. United States,* 335 U.S. 1, 31 (1948). This is particularly true where, as here, remedial legislation is involved. Construction should be broad in order to effectuate its purposes. *Tcherepnin v. Knight,* 389 U. S. 332, 336 (1967). Even assuming, without concluding, that the definition were clear, respondent's argument is unconvincing. Where to follow the plain meaning of words in a statute will lead, though not to absurdities, to an unreasonable result, plainly at variance with the policy of the legislation as a whole, the purpose of the statute, rather than the literal words, is followed. *United States v. American Trucking Association* 310 U.S. 534, 543 (1940). When aid to construction of the meaning of words, as used in a statute is available, there can be no rule of law which forbids its use, however clear words may appear on superficial examination. *Train v. Colorado Public Interest Group,* 426 U.S. 1, 10 (1976).

The intent of the Ohio legislative is found in part from the evidence provided by Juris that the definition was not intended to exclude coating lines which lacked ovens. To eliminate any ambiguity and concerning the definition, in 1985 Juris revised the definition to clarify OEPA's intent that a "coating line" need not have an oven. In further support of its intent and interpretion of the definition in issue, in a communication dated March 3, 1986, OEPA advised the U. S. Department of Justice that it interpreted "coating line" to apply to coating activities which do not make use of either flash-off areas or ovens. (Ex. C-5) An administrative agency's interpretation is entitled to great deference. *Chevron U.S.A. Inc. v. National Resources Defense Council Inc.,* ____ U. S. ____, 81 L. Ed.2d 694, (1984). The Agency's interpretation is controlling unless plainly enroneous. *United States v. City of Painesville,* 644 F. 2d 1186, 1190 (6th Cir. 1981), *cert. denied,* 454 U.S. 894 (1981).

Respondent's argument contains an additional frailty. To illustrate, Section 3745-21-09(U)(1)(a)(ii) concerns mis-

cellaneous metal part or product coating lines that apply "zinc rich primer coating." This term is defined to mean "any coating which contains primarily zinc pigment . . . and which is dried at ambient or inplant temperature." Section 3745-21-01-(D)(51). Such drying occurs without an oven. It, therefore, follows by definition that Section 3745-21-09(U) applies to coating lines that do not have ovens.

Respondent's coating lines without ovens, more particularly lines R004 and R005, come with the scope of the definition of "coating line" and are subject to the requirements of OAC § 3745-21-09(U).

3. *Coating Operations*

OAC § 3745-21-09(u)(2) provides that the requirements of the Section shall not apply to certain operations. Among such operations is "the application of a refinishing coating to motor vehicles." Section 3745-21-09(U)(2)(c). "Refinishing" and "motor vehicles" are not defined. Coating lines P003, P004 and P008 are involved in respondent's refinishing operations.

In seeking exemption to the Section respondent relies principally upon the dictionary definition of "refinish" to support its position, which definition means "to give a new surface." It is argued that the common meaning of "refinishing" encompasses the application of paint to give a new surface to a previously painted surface; that trucks that have been "finished" are inspected before they are marked for delivery; that trucks with scratches or other problems in the paint finish are then refinished to correct these defects; and that respondent's operations come within the common meaning of "refinishing." (Resp. Op. Br. at 25-27) However, the black and white of the refinishing exemption lends credence to complainant's interpretation that respondent is not engaged in "refinishing." In short, respondent's additional operations are necessary to complete or *finish* the product, not to *re*finish it.

The position taken by the respondent is somewhat surprising in that it had been advised previously of the interpretation of OEPA concerning "refinishing coating." In 1981, the Regional Air Pollution Control Agency wrote to Nooks responding to his question concerning "refinishing." The respondent, through Nooks, was advised that the intent and interpretation of OEPA concerning the refinishing exemption were that "refinishing coating" refers to work done by body shops during the repair of damaged vehicles and it did not apply to work done by a vehicle manufacturer who performed top coat repair, and that the refinishing exemption did not apply to these operations of respondent. (Ex. C-3; Tr. 271) This position is reinforced by Juris, who drafted the refinishing exemption. His testimony showed that the intent of the "refinishing" exemption was that it apply to body shops in the motor vehicle after market, and OEPA did not mean that the exemption apply to paint repair by assembly plants prior to delivery and sale of the motor vehicle. (Ex. C-2 at 5) Assuming, without concluding, that there exist some question concerning the meaning of "refinishing" as used in the exemption, such doubt must be resolved in favor of complainant because of the evidence offered by Juris and that expressed in Exhibit C-3. For the reasons mentioned above concerning coating lines, great weight and deference must be accorded to the intent and interpretation of OEPA, the drafters of the refinishing exemption. Lines P003, P004, and P008 do not come within the "refinishing" exemption of OAC § 3745-09-(U)(2)(c) and such lines are subject to OAC § 3745-21-09-(U)(1).

The Section and its subsections (1) and (a) apply to "miscellaneous metal part or product" coating lines. The testimony of Juris showed OEPA intent and interpretation to be: (1) That the Section does not regulate coating of pure non-metallic parts; (2) This is so even if the non-metallic part is attached to the same hanger as the metal part during the coating or painting process; and (3) The Section does not

regulate coating of non-metallic parts where these parts are not physically attached to the metallic parts. (Ex. R-13 at 2; Tr. 291-296) It does not necessarily follow, however, that because non-metallic parts within a coating line are not regulated that the *entire* coating lines does not come within the purview of the Section. OEPA interpretation of the Section is that coating lines which coat both metallic and non-metallic parts are subject to regulation under the Section. (Exs. C-1, attachment J; C-6 at 7) This is the case even though the coating line coats 90 percent non-metallic parts and 10 percent metal parts;—it remains a "miscellaneous metal part or product coating line." (Tr. 339) Also to be considered on this issue is the opinion of Nooks. Though a non-lawyer, he was perforce well acquainted with, and had a working knowledge of, the Section as it applied to his employer's facility. He had informed his superiors that in his opinion *all* the lines* listed on page five of his verified affidavit were in violation of the Section. (Tr. 219-220) OAC § 3445-21-09(U) applies to respondent's coating lines P001, P002, P003 and P007.

ULTIMATE CONCLUSIONS

1. Respondent's coating lines 57 (P001), 58 (P002), 59 (P003), 61 (P004), 64 (P007), 77 (P008), 26 (P009), chassis line 1 (R004) and chassis line 2 (R005) at its Springfield, Ohio, Assembly Plant are subject to the Ohio Administrative Code § 3745-21-09(U)(1).

2. Respondent caused, allowed and permitted the discharge of volatile organic compounds into the ambient air from

* This is respondent's Exhibit 6. Among the lines listed on page five are P001, P002, P003 and P007, which lines are used in part to paint non-metal parts.

the aforementioned coating lines which exceed the emission limitation of 3.5 pounds per gallon of coating for extreme performance coatings.

3. Respondent's coating lines do not meet the requirements of Ohio Administrative Code §§ 3745-21-09(U)(1)(a) or (b); nor are any of the respondent's coating lines exempt under § 3745-21-09(U)(2) of the aforementioned Code.

4. Respondent is a major stationary source under section 302 of the Act, 42 U.S.C. § 7602, and as defined in 40 C.F.R. § 66.3(g) because it directly emits on has the potential to emit, over 100 tons of volatile organic compounds into the ambient air.

5. The failure of complainant to enclose a copy of the penalty calculation Technical Support Document and Instruction Manual with the Notice of Noncompliance at the time of its service upon respondent had no effect on the validity of the Notice of Noncompliance, and did not impair the jurisdiction of U.S EPA to proceed with adjudication of the proceeding.

6. Respondent's coating lines R004 and R005 are subject to the Ohio Administrative Code § 3745-21-09(U)(1) in that coating lines are subject to regulation whether or not they have ovens.

7. The exemption in the Ohio Administrative Code § 3745-21-09(U)(2)(c) for "the application of a refinishing coating to motor vehicles" does not apply to any coating line involved in this proceeding.

8. Coating lines which coat both metal and non-metal parts or products are "miscellaneous metal part or product coating line[s]" subject to Ohio Administrative Code § 3745-21-09(U).

Respondent has violated the Ohio Administrative Code § 3745-21-09(U)(1)(a)(iii) concerning each of the coating lines mentioned above in paragraph "1" since the issuance of the Notice of Noncompliance on September 24, 1984, and is subject to a penalty under Section 120 of the Clean Air Act.

/s/ Frank W. Vanderheyden
Frank W. Vanderheyden
Administrative Law Judge

Dated: December 19, 1986

APPENDIX F

APPENDIX F

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

ENVIRONMENTAL PROTECTION AGENCY, *Complainant* v. INTERNATIONAL HARVESTER CORPORATION, *Respondent*	Docket No. CAA-120-V-84-1-A

RULING

This confirms the oral ruling of the undersigned of November 7, 1985 *GRANTING* complainant's motion in limine (motion) served September 9, 1985, which ruling was iterated in a prehearing conference report of November 12, 1985. The respondent's Motion for Reconsideration of November 11, 1985 is *DENIED,* and its submission of December 3, 1985 has been reviewed. The parties are well aware of their arguments advanced concerning the motion and they will not be repeated here, except to the extent deemed necessary by the undersigned for the purposes of this ruling.

By way of background, the present proceeding originates under the Clean Air Act, 42 U.S.C. § 7401, *et seq.* (Act), more specifically, Section 120 thereof, 42 U.S.C. § 7420. The motion sought to preclude the introduction into evidence, in the liability stage of the Section 120 proceeding, of any evidence regarding alleged technical or economic infeasibility of respondent to comply with the state implementation plan (SIP) of the State of Ohio.

As amended in 1970,[1] the Act gave to the states the responsibility for formulating pollution measures; they had to establish minimum compliance requirements. *Union Electric Co. v. EPA,* 427 U.S. 246, 256-257 (1976). However, the complainant (sometimes U.S. EPA) has the ultimate responsibility for the attainment of air quality standards. *Train v. National Resources Defense Council,* 421 U.S. 60, 78-79 (1975); *Ohio Environmental Council v. EPA,* 593 F.2d 24, 31 (6th Cir. 1979). The Act contains two civil penalty provisions. One of these gave the federal court jurisdiction, Section 113(b), 42 U.S.C. § 7413(b) and, pertinent to this ruling, Section 120, which provides for an administrative proceeding. U.S. EPA has the option, however, as it chose here, of proceeding under both sections. 42 U.S.C. § 7420(f). Congress has precluded federal courts from staying Section 120 proceedings prior to the court's final determination.[2]

One of the main purposes of Section 120 was to enable complainant to recover from an alleged violator any economic benefit it may have derived by noncompliance. That section was added because Congress anticipated that even the augmented civil and criminal arrangement may not create sufficient incentives for source or alleged violators to comply with the air quality standards. *Duquesne Light v. EPA,* 698 F.2d 456, 463 (D.C. Cir. 1983). To implement Section 120, the complainant promulgated regulations,[3] which provide for two separate hearings. The first hearing would address the issue of liability, or whether or not source was in violation of applicable legal requirement or entitled to certain specified exemptions. (40 C.F.R. § 66.41). Should it be determined that a source is

---

[1] Pub. L. 91-604, 84 Stat. 1676, 1680.

[2] "In any action respecting . . . the administration or enforcement of Section 7420 . . . no court shall grant any stay, injunctive or similar relief before final judgment by such court in such action." 42 U.S.C. 7607(g).

[3] 40 C.F.R. Part 66, effective October 27, 1980.

in violation of the SIP, it is required to submit a penalty calculation as set out in 40 C.F.R. Part 67, Appendices A and B. A second hearing may be granted by complainant to determine whether or not respondent's penalty calculations were performed correctly. 40 C.F.R. Part 66, Subpart F. Early in the proceeding, respondent conceded that the hearing was to be bifurcated and that the underlying issue was the extent to which it was not in compliance with the Ohio Rule, and that any final determination of penalty owed should "await the conclusion of that proceeding," and that the Regional Administrator of complainant "stay further penalty calculation procedures until the proceeding before Judge Vanderheyden is finally adjudicated." (Petition for Reconsideration of Penalty Calculation, May 20, 1985, at 8, 9). The Regional Administrator concurred in this position. (Decision of Petition for Reconsideration of Penalty Calculation and Recommended Disposition, July 8, 1985, at 4). The parties have thus agreed that a Section 120 proceeding contemplates a bifurcated hearing, first addressing liability and thereafter the penalty queston if required.

From the inception of this matter on September 28, 1984, when the Regional Administrator of the complainant issued his Notice of Noncompliance, it has had a long and agonizing journey. Along the way, the Regional Administrator granted a hearing to respondent confined solely to the issues of whether or not the latter was in violation of certain provisions of the Ohio Rules and whether or not it was entitled to an exemption under 40 C.F.R § 66.31. The claims of respondent that it may assert claims concerning either technical or economic infeasibility as a defense in the liability stage of the proceeding rest upon a soggy legal basis. On the facts herein, one will search Section 120 in vain to find support for this thesis.[4] This is

[4] Any reliance by respondent upon 42 U.S.C. 7420(a)(2)(B)-(iv) would be misplaced. First, it would have to demonstrate that

(Footnote continued on following page.)

butressed by the legislative history, in which Senator Muskie, in a dialogue with Senator Stafford, stated that the question of feasibility may not be raised as a defense to a delayed compliance penalty *or other enforcement action.* 3 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, 341, 346-7; *Friends of the Earth v. Potomac Electric Power Co.,* 419 F. Supp. 528, 535 (D.D.C. 1976).

Respondent's claims of technical or economic infeasibility are not defenses in the liability portion of the hearing, and evidence pertaining thereto is not germane to the question of whether or not respondent is in violation of the Ohio Rule in contention and whether or not it is entitled to an exemption under 40 C.F.R. § 66.31. It may be apposite at this juncture to observe that granting the motion expedites the proceeding and thus serves the public interest. A proceeding confined to respondent's liability should presumptively be concluded with greater alacrity than one where a blizzard of data on the issue of infeasibility would most certainly impede and protract the litigation. Such factors of economy, efficiency and time, in addition to the legal authority mentioned above, have weighed heavily in favor of granting the motion.

Turning now to the matter of offer of proof, respondent's thinking that it may make same in any manner it selects is rejected. To accede to respondent's thinking, including making

---

(Footnote continued from preceding page.)

"inability" to comply resulted from reasons "entirely beyond the control" of the source. Additionally, however, the subsection contains the condition, that the source shall be exempt from a noncompliance penalty if it can demonstrate that the failure to comply was due solely to "an inability to comply . . . for which inability the source *received an order* under Section 7413 (d) . . . (or an order under 7413 of this title issued before August 7, 1977). . . ." (emphasis supplied) This condition is echoed in 40 C.F.R. § 66.31(a)(4). Respondent conceded that it does not meet these qualifications. (Joint Pretrial Submittal Facts That Have Been Established by the Pleadings, Stipulations or Admissions by Parties. June 14, 1985, at 13, par. 9).

offers of proof by oral testimony, is like an elephant sitting in a rowboat. It is just not the right vehicle. Among its numbing liabilities is that it would increase the size of the transcript, the costs associated with same, burden and confuse the record, and inordinately lengthen the hearing. Common garden intelligence commands that offers of proof, with particular reference to technical or economic infeasibility, be governed by the C.F.R. § 22.20(b). This section of the Consolidated Rules of Practice provides, in short, that such offers for excluded oral testimony shall consist of a *brief* statement describing the nature of the evidence excluded. Concerning offers of proof for excluded documents or exhibits, these shall be in the form of insertion into the record as excluded or rejected documents or exhibits. This procedure is adequate to protect any real or imagined procedural due process rights of the respondent, and also to provide the Administrator on appeal with sufficient knowledge to make a determination concerning whether or not the evidentiary rulings were erroneous and prejudicial.

Administrative agencies are not bound by the standards of the Federal Rules of Civil Procedure. (Fed. R. Civ. P.). They enjoy "wide latitude" to fashion their own rules of procedure for the discharge of their duties. *Oak Tree Farm Dairy, Inc. v. Block,* 544 F. Supp. 1351, 1356, n.3 (E.D. N.Y. 1982). Discovery is controlled essentially by 40 C.F.R. § 22.19(f). Though not mandatory, and where appropriate, the Fed. R. Civ. P., more particularly Sections 26(b)(c), however, are guidelines in discovery issues. In pertinent part, Fed. R. Civ. P. 26(b)(1) provides that: "The . . . extent of use of the discovery methods . . . (a) shall be limited by the court if it determines that . . . . (iii) the discovery is unduly burdensome or expensive, taking into account the *needs of the case* . . . and the *importance* of the issues at stake in litigation . . . ." (emphasis supplied) In that evidence of infeasibility is inadmissible in the liability hearing, it does not serve the "needs of the case" and is of little "importance." Most important, however, is that to permit

discovery on the issue of infeasibility would, under the Rules of Practice of U.S. EPA, "unreasonable delay the proceeding" and not have "significant probating value." 40 C.F.R. § 22.19(f)(i), (iii). For the foregoing reasons discovery should be denied even where alleged evidence is sought for the purposes of making offers of proof concerning purported infeasibility. To permit an exception for such purposes would vitiate a large part of this ruling in that it would either protract the proceeding or be unduly burdensome.

There is abundant and persuasive authority to confine discovery solely to the issue of respondent's liability and postponing any discovery regarding infeasibility until such time when, and if, it is necessary to enter the penalty phase of the hearing. *Sinclair Refining Company v. Jenkins Petroleum Process Company,* 289 U.S. 689, 693-694 (1933); *Orgel v. Clark Boardman Co.,* 20 F.R.D. 31, 32 (S.D. N.Y. 1956); 4 Moore's Federal Practice, par. 26.56[5]; Wright and Miller, Federal Practice and Procedure, § 2040. Discovery by the parties shall be confined to the issue of respondent's liability and its entitlement to an exemption pursuant to C.F.R. § 66.31. No discovery will be ordered on the questions of technical or economic infeasibility. However, much discretion is accorded the undersigned in matters of discovery. Where appropriate, some flexibility should be applied in order not to have a party return to the same source for discovery in the penalty phase of the hearing for possible evidence that could have been obtained during discovery in the liability stage. Judicial discretion and economy would suggest that discovery on infeasibility not be foreclosed completely, and that some balance be struck where possible, consonant with the thrust of this ruling. Therefore, discovery will be permitted to the following extent *only*: If a witness *voluntarily* wishes to provide information on infeasibility he may do so, *provided* this does not impede the proceeding generally, and in particular with reference to the pretrial schedule and date for commencement of the hearing

which will be set out in an order to be issued shortly by the undersigned.

IT IS RULED, for the reasons mentioned above, that the undersigned's rulings and order set out in his PHC report of November 12, 1985 are confirmed, as modified by the order of December 10, 1985 canceling the previously scheduled hearing date. It is reiterated that complainant's motion is *GRANTED.*

IT IS FURTHER RULED that:

1. The hearing shall consist of two phases. The first phase of the hearing shall be exclusively with the question of respondent's liability, concerning whether or not it violated certain provisions of State Air Laws of Ohio, and whether or not the respondent is entitled to an exemption pursuant to 40 C.F.R. § 66.31, as set out by the Regional Administrator of the complainant on page five of his Decision on Petition for Reconsideration dated April 3, 1985.

2. In the first phase of the hearing, any evidence offered by respondent concerning claims of technical or economic infeasibility in complying with the Ohio SIP do not constitute defenses to liability for violation thereof.

3. Claims of technical and/or economic infeasibility with the Ohio SIP are irrelevant to a determination of liability for violation, and that they shall not be admitted into evidence during the first phase of the hearing.

4. Upon motion by respondent, evidence that is rejected for the reason that it concerns infeasibility may be retained in the record as an offer of proof on the issue of liability for a penalty (second stage of hearing). The rejection of such evidence shall be without prejudice to respondent's right to reoffer such evidence in the event the proceeding enters the second phase, addressed to the amount of penalty.

5. Respondent may make an offer of proof only in strict conformance with 40 C.F.R. § 22.23(b). Specifically, respond-

ent may not make an offer of proof in any manner it selects and may not make an offer of proof by means of live testimony.

6. Discovery shall be limited to the issue of respondent's liability for violation of Ohio Rule 3745-21-09(U). Nor may discovery be used to obtain evidence concerning infeasibility for the purposes of making offers of proof on such question. Notwithstanding this limitation, if a witness *voluntarily* wishes to provide information on both the liability and penalty issues, including infeasibility, the witness may do so. However, such voluntary discovery *may in nowise* impede the liability phase of the hearing, *or the commencement of same,* and must be accomplished within the pretrial discovery schedule set by the undersigned. No order will issue compelling discovery on either technical or economic infeasibility, questions reserved solely for the second phase of the hearing concerning penalty calculation.

7. All direct testimony shall be in the form of verified written statements instead of direct oral testimony.

/s/ Frank W. Vanderheyden
Frank W. Vanderheyden
Administrative Law Judge

Dated: December 13, 1985
Washington, D.C.